

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM THOMPCKINS,

Defendant-Appellant.

UNPUBLISHED

October 23, 2001

No. 220542

Wayne Circuit Court

LC No. 97-010272

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to ten to twenty years' imprisonment for the armed robbery conviction, a concurrent term of fifteen to thirty years' imprisonment for the conspiracy conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied his right to a fair trial and an impartial jury because a prospective juror announced during voir dire that he had had "dealings" with either defendant or his brother, codefendant Michael Thompkins, at the Wayne County Jail. We disagree. Initially, we note that although defendant mentioned the comment the day after it occurred, he did not move for a mistrial or other relief below on the basis of the comment. Accordingly, to warrant relief on appeal, defendant must show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).¹

¹ We additionally note that defendant did not exercise all his peremptory challenges. A defendant must generally exhaust all peremptory challenges in order to preserve a jury selection question for appellate review. *People v Jendrzewski*, 455 Mich 495, 514 n 19; 566 NW2d 530 (1997).

Defendant has not met his burden for relief. First, the potential juror did not indicate that defendant had been an inmate of the jail but instead merely stated that he had had contact and dealings with “Mr. Thompkins” while working at the jail. In addition, the prospective juror specifically stated that defendant or his brother “hasn’t been bad.” Therefore, the comments did not tend to portray defendant in a negative light. Finally, the juror whom defendant contends heard the remarks and then ended up serving on defendant’s jury indicated that he could be fair and impartial. Under these circumstances, we discern no obvious error that reasonably affected the outcome of the proceedings. *Id.*

Defendant next contends that he was denied a fair trial because he was required to appear before the jury wearing handcuffs. We disagree. The decision to restrain a defendant is reviewed “for an abuse of discretion under the totality of the circumstances.” *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). To obtain the reversal of a conviction on the basis that he was handcuffed in the presence of the jury, a defendant must establish that he was prejudiced by the exposure. *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), modified on other grounds 433 Mich 851 (1989).

The record reveals no basis for relief. The situation is analogous to that in *People v Herndon*, 98 Mich App 668, 673; NW2d (1980), in which the Court stated:

Although evidence in the record indicates that defendant may have been in the presence of the jury while in handcuffs, there is no evidence that would indicate that any member of the jury ever saw handcuffs on defendant. Further, defense counsel did not request an evidentiary hearing to inquire as to whether members of the jury saw shackles on defendant and, if they did, whether they were thereby prejudiced. See, *People v Panko*, [34 Mich App 297; 191 NW2d 75 (1971)] In the absence of such an evidentiary record we are unable to hold that defendant was denied his right to a fair and impartial jury.

Similarly, in this case, there is no evidence on the record that a juror who actually deliberated defendant’s case saw him in handcuffs. Moreover, and significantly, the trial court instructed the jury panel not to draw any negative inferences from the fact that defendant was in custody and specifically asked the prospective jurors if anyone thought that defendant was more likely to be guilty of an offense because he was in custody. None of the prospective jurors responded affirmatively to the trial court’s questioning. Accordingly, defendant has not established prejudice and is not entitled to relief. See *Moore, supra* at 384-385.

Defendant next argues that the prosecutor committed misconduct requiring reversal by eliciting testimony about an immunity agreement from prosecution witness Elisia Brockington and by vouching for Brockington’s credibility during closing and rebuttal arguments. However, defendant did not object to the prosecutor’s allegedly improper conduct. “Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant’s claim for plain error.” *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 310 (2000). Accordingly, to warrant relief defendant once again must show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *Carines, supra* 763.

“Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context.” *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor may not intimate that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a mere reference to a plea agreement containing a promise for truthfulness does not in itself require reversal. *Bahoda*, *supra* at 276. Although such agreements should be admitted with caution, their admission is not error unless used by the prosecutor to suggest that the government had some special knowledge that the witness was testifying truthfully. *Id.*; *People v Turner*, 213 Mich App 558, 584-585; 540 NW2d 728 (1995).

Contrary to defendant’s argument, the prosecutor’s questioning of Brockington on direct examination was not improper. The prosecutor did not suggest that she had some special knowledge, unknown to the jury, that Brockington was testifying truthfully. *Bahoda*, *supra* at 276; *Turner*, *supra* at 585. Rather, the prosecutor simply reminded Brockington that she was required to testify truthfully pursuant to the immunity agreement. The prosecutor’s questioning in this regard does not require reversal.

Defendant also argues that the prosecutor improperly vouched for Brockington’s truthfulness in the prosecutor’s initial closing argument. We agree. The prosecutor personally vouched for Brockington’s credibility when she stated that Brockington “was being truthful when she testified” before the jury. However, notwithstanding the fact that the argument was improper, reversal is not required. As noted earlier, to obtain relief for this unpreserved claim of error, defendant must show that the error affected the outcome of the lower court proceedings. *Carines*, *supra* at 763.

Defendant is unable to make this showing. First, the evidence against him was overwhelming. For example, we note that defendant’s fingerprints were recovered from the cellophane wrappers of the lottery tickets stolen during the armed robbery. In addition, when a police officer saw defendant walking down the street after the robbery and asked defendant for identification, defendant fled, but was eventually captured with the assistance of another officer. The officers recovered \$958 from defendant, consisting of 183 \$1 bills, forty-three \$5 bills, nineteen \$10 bills, eleven \$20 bills, five \$50 bills, and one \$100 bill. The above evidence clearly connected defendant to the robbery. Moreover, although the prosecutor’s argument was improper, the trial court instructed the jury that the attorneys’ arguments were not evidence. Finally, the jury had already been informed, through the *proper* questioning of Brockington, that she was required to testify truthfully. Accordingly, defendant has not established that the prosecutor’s improper statement during her initial closing argument affected the outcome of the proceedings, and reversal is unwarranted. *Id.*²

² We additionally note that reversal is unwarranted because an immediate objection and a cautionary instruction could have cured any potential prejudice resulting from the prosecutor’s remark. See *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995).

Defendant further argues that the prosecutor improperly bolstered Brockington's credibility during her rebuttal argument. However, the record shows that in making the challenged comments, the prosecutor was simply commenting on the evidence properly presented at trial concerning Brockington's immunity agreement. A prosecutor may properly comment about and draw inferences from the evidence adduced at trial. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). In addition, we note that the prosecutor was responding to the closing argument of a codefendant's attorney, who suggested that Brockington was required to conform her testimony to her statements to police even though the statements may not have been entirely true. An impermissible remark made by a prosecutor in response to a comment previously made by defense counsel does not require reversal. *Id.* In any event, the prosecutor did not suggest that she had some special knowledge that Brockington was testifying truthfully. *Bahoda, supra* at 276; *Turner, supra* at 585. Therefore, the prosecutor's rebuttal argument was not improper.

Finally, defendant argues that the trial court erred in denying defendant's motion for a mistrial after two members of the jury allegedly were harassed during a break in deliberations. We disagree. We review a trial court's decision to grant or deny a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion occurs if an unbiased person, considering the facts on which the trial court relied, would conclude that there was no justification for the ruling made. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Defendant contends that the trial court should have granted his motion for a mistrial because the harassment experienced by the two jurors created a potential for juror bias against him and denied him his right to an impartial jury. The record revealed, however, that the two jurors were not biased against defendant as a result of the contacts and that the encounters had no impact on the jurors' decisions. In fact, as defendant admitted in the lower court, there was no indication that either defendant or his family was involved in either incident. Contrary to defendant's argument, we conclude that the trial court's inquiry of the two jurors regarding whether the encounters had any impact on the verdicts³ was a sufficient and appropriate response to the potential problem. See, e.g., *People v Schram*, 378 Mich 145, 160-161; 142 NW2d 662 (1966). Because the jurors indicated that the encounters had not affected their decisions, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter

McDonald, J. did not participate.

³ We note that unlike in *People v Levey*, 206 Mich 129, 130; 172 NW 427 (1919), the trial court's inquiry in the instant case, which occurred the same day the jury delivered its verdict, was addressed to the two jurors that had allegedly been approached.